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REFLECTIONS ON MY FIRST YEAR

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Introduction

Thank you, Rich. It is a privilege to be here for your "last hurrah" as Chair of the Antitrust Section. I congratulate you on your productive tenure, and I thank you for being a tremendous friend and colleague. Don, congratulations on taking the gavel; I look forward to working with you.

I am particularly pleased to be here because I was unable to appear last year. Between the uncertainty of my confirmation status and a foot in a cast, a speech in Atlanta was simply not in the cards. Addressing you this year, however, gives me the chance to reflect on what will be, ten days from now, one full year on the job.

I had the fortune to inherit the leadership of a vibrant and effective agency. The scope and volume of our work for consumers continues to increase, and I am gratified that we have the resources to fulfill our important mission. The agency currently has a budget of $205 million and authorization for 1,074 FTE. The House of Representatives has passed legislation authorizing a budget of $211 million for FY 2006. The Senate Appropriations Committee has authorized the same amount, and the bill is now ready to be taken up by the full Senate. Our

[1]The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

resources continue to be allocated at roughly 60 percent consumer protection and 40 percent competition. As you know, we have been short-handed at four Commissioners since Commissioner Orson Swindle's June 30 departure, but we are hoping for the swift confirmation of Bill Kovacic, whom the President nominated on July 28, 2005. In other personnel news, Michael Salinger has replaced Luke Froeb as the Director of the Bureau of Economics and has jumped in ably and enthusiastically. (Michael will be in Lake Louise, so I hope that you will have the opportunity to see him there.)

Consumer Protection

Despite the transition during the last year, the work of the Commission has continued at a steady pace. On the consumer protection side, the number of new issues requiring our attention grows without ceasing. In addition to seemingly every manner of economic fraud that a criminal mind can divine, we are working to address spam, spyware, privacy and data security, credit reporting, childhood obesity, and now, possibly, deception in video-game ratings, among others. Through the third quarter of fiscal year 2005, we have obtained 74 judgments ordering more than $380 million in consumer redress and seven judgments ordering payment of more than $3 million in civil penalties. And we have filed 52 complaints in federal court, 31 of which are pending final disposition.

Attacking fraud that plagues the marketplace remains the core of the mission.[2] And we

[2]For example, we filed a series of lawsuits as part of "Operation Big Fat Lie" that targeted companies promoting products like a diet tea that an endorser claimed helped her lose 64 pounds in 10 weeks, so fast, in fact, that her doctor ordered her to slow down. *See* FTC Press Release, *FTC Launches "Big Fat Lie" Initiative Targeting Bogus Weight-loss Claims* (Nov. 9, 2004), *available at* http://www.ftc.gov/opa/2004/11/bigfatliesweep.htm. While facially ludicrous, these types of false claims cost consumers millions of dollars and discourage people from taking effective steps to manage their weight.

are increasing our work with criminal law enforcers to ensure that "fraudsters" are punished appropriately. Earlier this year, the FTC, the Department of Justice, the U.S. Postal Inspection Service, and 14 states announced an unprecedented law enforcement collaboration enforcers to target business opportunity fraud in a civil and criminal law enforcement sweep in which we announced more than 200 actions.[3] Working with our criminal law enforcement partners, 19 people in that sweep have been charged criminally, and four have been sentenced already with prison terms ranging from 57 to 81 months.

We continue the fight against computer-related fraud. To date, we have filed 78 spam-related cases against 219 individuals and companies. Most recently, we announced, together with DOJ, the filing of seven civil penalty cases against online operations supplying pornography that we alleged violated the FTC's Adult Labeling Rule and the CAN-SPAM Act.[4] In June, the FTC sued an operation that used bogus "scans" and illegal spam to market an anti-spyware program, SpyKiller, that we alleged did not work.[5] And just this week, we announced a settlement with the makers of software called SpyBlast, which was advertised as free software to help consumers combat spyware, but which also downloaded tracking software on computers so it could deliver pop-up ads.[6]

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[3]*See* FTC Press Release, *Criminal and Civil Enforcement Agencies Launch Major Assault Against Promoters of Business Opportunity and Work-at-Home Schemes* (Feb. 22, 2005), *available at* http://www.ftc.gov/opa/2005/02/bizzoppflop.htm.

[4]*See* FTC Press Release, *FTC Cracks Down on Illegal "X-rated" Spam* (July 22, 2005), *available at* http://www.ftc.gov/opa/2005/07/alrsweep.htm.

[5]*See* FTC Press Release, *FTC Halts Operation's Bogus "Anti-Spyware" Claims, Freezes Assets* (June 23, 2005), *available at* http://www.ftc.gov/opa/2005/06/trustsoft.htm.

[6]*See* FTC Press Release, *Advertising.com Settles FTC Adware Charges* (Aug. 3, 2005), *available at* http://www.ftc.gov/opa/2005/08/spyblast.htm.

Recognizing that enforcement alone will not eradicate these computer menaces, and as part of our continuing efforts to assist the private market in the creation, testing, evaluation, and deployment of the anti-spam and anti-phishing technology known as "domain-level authentication," the FTC recently established a website where technologists can share the results of tests on various domain-level authentication standards.[7] Additionally, the FTC and 35 government partners from more than 20 countries announced "Operation Spam Zombies," an international campaign to educate Internet Service Providers and other Internet connectivity providers about hijacked, or "zombie" computers that spammers use to flood in-boxes here and abroad.[8]

Our program to attack fraud targeting Spanish-speaking consumers remains in high gear. In two recent Hispanic Law Enforcement and Outreach Forums, held, respectively, in Miami and Phoenix, the FTC and other federal, state, and local law enforcement officials announced 61 law enforcement actions. The Forums also featured discussions among law enforcement agency and community representatives about combating fraud directed at Hispanics.[9]

The National Do Not Call Registry now contains more than 98 million numbers. Although compliance has been high, we continue to enforce against Registry violations. The Columbia House Company, a home entertainment club marketer, recently settled FTC charges

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[7]*See* FTC Email Authentication Questionnaire, *available at* https://secure.commentworks.com/FTC-EmailAuthenticationQuestionnaire/.

[8]For Operation Spam Zombies educational information, *see* http://www.ftc.gov/bcp/conline/edcams/spam/zombie/index.htm.

[9]*See* FTC Press Releases, *FTC Targets Scams Aimed at Hispanics* (July 26, 2005), *available at* http://www.ftc.gov/opa/2005/07/phoenix.htm; and *FTC and Law Enforcement Partners Continue Targeting Scammers of Spanish-Speakers* (May 17, 2005), *available at* http://www.ftc.gov/opa/2005/05/hispinit.htm.

that it called subscribers who had placed their telephone numbers on the Registry, and who had made specific requests to the company that they not be called. Columbia House will pay a $300,000 civil penalty and is barred from making illegal telemarketing calls in the future.[10]

In addition to law enforcement, our policy research and development and our consumer and business education programs are vital to our work. Three weeks ago, the FTC, together with the Department of Health and Human Services, hosted a workshop on marketing, self-regulation, and childhood obesity.[11] The 600-plus attendees engaged in productive discussions about this serious public health issue, with a focus on industry self-regulation concerning the marketing of food and beverages to children, as well as initiatives to educate children and parents about nutrition.

Perhaps no consumer protection issue has absorbed more time and resources this year than data security. Recent news reports about the release of consumers' sensitive information from large commercial information services, retailers, and major banks, demonstrate that, if this data is not adequately secured, it can fall into criminals' hands and cause serious harm to consumers. Currently, 10 million Americans are victims of identity theft each year.[12]

The FTC's primary goal is to encourage all companies to put in place solid information security practices *before* a breach can occur. We believe that our law enforcement efforts are

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[10]*See* FTC Press Release, *Columbia House Settles FTC Charges of Do Not Call Violations* (July 15, 2005), *available at* http://www.ftc.gov/opa/2005/07/columbiahouse.htm.

[11]For an agenda, presentations, and other information on the workshop, Perspectives on Marketing, Self-Regulation, and Childhood Obesity, *see* http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm.

[12]*See* Consumer Fraud in the United States: An FTC Survey, at ES-2 (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

focusing firms on the issue. To date, we have filed five cases challenging false security claims under the FTC Act. In each case, we alleged that the defendants promised that they would take reasonable steps to protect consumers' sensitive information, but failed to do so.[13]

We recently filed and settled our sixth case in this area, for the first time alleging that inadequate data security can be an unfair business practice under Section 5 of the FTC Act.[14] In that action, the Commission alleged that BJ's Wholesale Club, a Fortune 500 company with over $6 billion in annual sales, failed to maintain adequate security for such information, even though the company had not made an express promise to maintain such security. Our settlement required BJ's to establish a comprehensive and rigorous information security program, and to obtain regular security assessments of that program from a qualified independent auditor. This action should provide clear notice to the business community that failure to maintain reasonable and appropriate security measures in light of the sensitivity of the information can cause substantial consumer injury and may violate the FTC Act.

The FTC also educates consumers and businesses about the risks of identity theft and assists victims and law enforcement officials. The FTC maintains a website and a toll-free hotline staffed with trained counselors to advise victims on how to reclaim their identities. We receive roughly 15 to 20 thousand contacts per week on the hotline, or through our website or mail, from victims and from consumers who want to avoid becoming victims. The FTC also facilitates cooperation, information sharing, and training among federal, state, and local law

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[13]For documents related to these enforcement actions, see http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html.

[14]*See* FTC Press Release, *BJ'S Wholesale Club Settles FTC Charges* (June 16, 2005), *available at* http://www.ftc.gov/opa/2005/06/bjswholesale.htm.

enforcement authorities fighting this crime.

Nor surprisingly, Congress has been debating whether to enact new protections for sensitive consumer data, and I now have testified four times on the issue.[15] While urging caution, lest overly broad protections impede the flow of information that has become vital to the marketplace that consumers have come to expect, the Commission has opined that Congress should consider two new proposals: first, whether companies that maintain sensitive consumer information should be required to implement reasonable security procedures; and second,

whether to require firms to notify consumers if sensitive information about them has been breached in a way that creates a significant risk of identity theft.

Competition

So far in fiscal year 2005, the Commission has brought ten actions to prevent anticompetitive mergers, which collectively involved approximately $68 billion in commerce.[16]

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[15]Prepared Statement of the FTC, *Data Breaches and Identity Theft*, Before the Committee on Commerce, Science, and Transportation of the United States Senate (June 16, 2005), *available at* http://www.ftc.gov/opa/2005/06/datasectest.htm; Prepared Statement of the FTC, *Securing Electronic Personal Data: Striking A Balance Between Privacy and Commercial and Governmental Use*, Before the Committee on the Judiciary, United States Senate (Apr. 13, 2005), *available at* http://www.ftc.gov/opa/2005/04/financialdatatest.htm; Prepared Statement of the FTC, *Protecting Consumers' Data: Policy Issues Raised by ChoicePoint*, Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United States House of Representatives (Mar. 15, 2005), *available at* http://www.ftc.gov/opa/2005/03/databrokertestimony.htm; and Prepared Statement of the FTC, *Identity Theft: Recent Developments Involving the Security of Sensitive Consumer Information*, Before the Committee on Banking, Housing, and Urban Affairs of the United States Senate (Mar. 10, 2005), *available at* http://www.ftc.gov/opa/2005/03/idthefttest.htm.

[16]Decision and Order, *In the Matter of Chevron Corp. and Unocal Corp.*, Docket No. C-4144 (July 27, 2005), *available at*

Of these matters, six were resolved by consent agreements, two transactions were withdrawn, and two transactions were modified or restructured to address possible staff concerns about competitive issues. The Commission also issued an opinion in which it found that Chicago Bridge & Iron ("CB&I") violated Section 7 when it acquired the assets of Pitt-Des Moines, Inc., and, consequently, ordered a divestiture to restore competition to the pre-merger level. The transaction gave CB&I a monopoly or near-monopoly in three storage tank markets, and in a fourth related market, and the Commission found that the potential for anticompetitive effects suggested by the highly concentrated market structure was corroborated by substantial evidence of pre-acquisition competition in the relevant markets.[17] CB& I and Pitt-Des Moines were each others' closest competitors in the relevant markets, and customers frequently played one firm off against the other to obtain lower prices. In addition, in each market, entry was difficult and time-consuming.

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http://www.ftc.gov/os/caselist/0510125/050802do0510125.pdf; Decision and Order, *In the Matter of Valero, L.P. and Kaneb Services LLC*, Docket No. C-4141 (July 22, 2005), *available at* http://www.ftc.gov/os/caselist/0510022/050726do0510022.pdf; Decision and Order, *In the Matter of Occidental Petroleum Corp. and Vulcan Materials Co.*, Docket No. C-4139 (July 13, 2005), *available at* http://www.ftc.gov/os/caselist/0510009/050719do0510009.pdf; Statement of the Commission, *In the Matter of Omnicare/NeighborCare, Inc.*, File No. 041 0146 (June 15, 2005), *available at* http://www.ftc.gov/os/caselist/0410146/0410146.htm; Press Release, *FTC Closes its Investigation of Harrah's Entertainment, Inc.'s Acquisition of Caesars Entertainment, Inc.* (June 9, 2005), *available at* http://www.ftc.gov/opa/2005/06/harrah.htm; Decision and Order, *In the Matter of Cytec Industries, Inc.*, Docket No. C-4132 (Apr. 7, 2005), *available at* http://www.ftc.gov/os/caselist/0410203/050412do0410203.pdf; Decision and Order, *In the Matter of Cemex, S.A. de C.V.*, Docket No. C-4139 (Mar. 25, 2005), *available at* http://www.ftc.gov/os/caselist/0510007/050329do0510007.pdf; Decision and Order, *Genzyme Corporation/Ilex Oncology, Inc.*, Docket No. C-4128 (Dec. 20, 2004), *available at* http://www.ftc.gov/os/caselist/0410083/041220do0410083.pdf.

[17]Commission Opinion, *In the Matter of Chicago Bridge & Iron Co.*, Docket No. 9300 (Jan. 6, 2005), *available at* http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.

In another significant merger decision, the Commission closed the *Arch Coal* investigation, following the district court's denial of the Commission's request for a preliminary injunction.[18] After careful review of the district court's decision, as well as the evidence obtained by staff before and after the court issued its ruling, a majority of the Commission applied the principles that the Commission had set forth in 1995[19] and concluded that administrative litigation would not serve the public interest. The Commission noted that (1) the district court had conducted a lengthy preliminary injunction hearing that allowed staff to present most of the evidence that staff would have presented at a full trial on the merits; (2) additional evidence obtained by staff after the district court issued its decision did not on balance support an administrative trial; (3) staff would have essentially duplicated its prior efforts at an administrative trial by presenting largely the same evidence that the district court had found insufficient; and (4) the court of appeals corrected the most significant legal error by the district court. The district court had held that the Commission's case rested on a novel theory of coordinated effects because the Commission had alleged that the parties might coordinate their decisions with respect to output, rather than price. While rejecting the Commission's request for a stay of the district court's decision pending appeal, the court of appeals specifically stated that there was nothing novel about the Commission's theory of competitive harm.

As I previously announced, we are endeavoring to improve our own practices and to

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[18]Commission Statement, *In the Matter of Arch Coal, Inc.*, Docket No. 9316 (June 13, 2005), *available at* http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf.

[19]*Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction*, 60 Fed. Reg. 39,741, 39,743 (1995); 4 Trade Reg. Rep. (CCH) ¶ 13,242 at 20,994 (Aug. 3, 1995).

make those practices more transparent. The two task forces – the Merger Process Task Force and *Horizontal Merger Guidelines* commentary task force – are hard at work. I continue to believe that we must make the merger review process more efficient and effective on a lasting basis, and I am committed to instituting reforms. But I am ever amazed at the unproductive and unprofessional conduct of some members of our bar or their clients. The reality is that we can implement new procedures at the FTC, and the Section's merger process task force can recommend others, and the Antitrust Modernization Commission can examine whether new rules are needed; but if we do not have a reasonable level of assurance that parties are dealing in good faith, new rules and process reforms will be, I fear, dead-on-arrival.

This spring, the Commission conducted an extensive review of the proposed Blockbuster/Hollywood Video merger. The parties abandoned the transaction before the Commission had concluded its investigation. Notably, during the review, the Commission brought a "g(2)" action to enforce the requirements of the Hart-Scott-Rodino Act.[20] The action was filed to prevent Blockbuster from closing the transaction before it had produced pricing data that was important to determining whether the transaction was likely to reduce competition. Blockbuster had maintained, incorrectly, that it had complied with the Commission's information requests. The g(2) action was only the second in the Commission's history. The decision to file the g(2) action reflects the importance the Commission attaches to the integrity of the HSR process.

Over the last year, the Commission also had an active non-merger docket. The

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[20]Complaint, *FTC v. Blockbuster, Inc.* (D.D.C. Mar 2, 2005), *available at* http://www.ftc.gov/os/caselist/blockbuster/050304compblockbuster.pdf.

Commission conducted two administrative trials, *Unocal*[21] and *Evanston,*[22] and heard three oral arguments, *Rambus,*[23] *Kentucky Household Goods Carriers Association* ("*Kentucky Movers*"),[24] and *North Texas Specialty Physicians.*[25] Of those matters, the Commission issued an opinion in the *Kentucky Movers* matter on June 23, 2005.[26] The other two are under consideration, and in *Rambus*, the Commission recently reopened the record to admit certain new evidence obtained from the record in a private action against Rambus.[27] In March 2005, the Eleventh Circuit reversed the Commission's ruling in the *Schering* case[28] and then in May denied the petition for rehearing. Two weeks ago, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's opinion in the *Three Tenors* case, validating the Commission's approach to analyzing horizontal conduct among competitors.[29]

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[21]*In re Union Oil Company of California, available at* http://www.ftc.gov/os/adjpro/d9305/index.htm.

[22]*In re Evanston Northwestern Healthcare Corp. and ENH Medical Group, Inc., available at* http://www.ftc.gov/os/adjpro/d9315/_baks/index.htm.0011.89d9.bak.

[23]*In re Rambus, Inc., available at* http://www.ftc.gov/os/adjpro/d9302/index.htm.

[24]*In re Kentucky Household Goods Carriers Association, available at* http://www.ftc.gov/os/adjpro/d9309/index.htm.

[25]*In re North Texas Specialty Physicians, available at* http://www.ftc.gov/os/adjpro/d9312/index.htm.

[26]Opinion of the Commission, *In the Matter of Kentucky Household Goods Carriers Association, Inc.*, Docket No. 9309 (June 23, 2005).

[27]Order Reopening the Record, *In re Rambus, available at* http://www.ftc.gov/os/adjpro/d9302/050720order.pdf.

[28]*Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005).

[29]*Polygram Holding Inc. v. FTC*, No. 03-1293, 2005 WL 1704732 (D.C. Cir. July 22, 2005).

The Commission also secured judgments and orders from five physician price-fixing groups.[30] This means that we now have physician groups comprising some 20,000 physicians under order – by some estimates, that is 10 percent of all doctors in the country. This has led me to question why the message is not being heard and whether we can improve our effectiveness as we could be in this area. We currently are evaluating our program and our approach. We do, however, remain convinced that competition in health care is preferable to the alternative.

Our enforcement work must and will remain the core of our work at the FTC. But we must never lose sight of the bigger picture. If one thing has become abundantly clear to me as I have worked through my first year, it is that competition needs a strong and constant champion, because its principles consistently are under attack. With each day I spend on the job, I am more convinced that antitrust enforcement alone does not adequately protect competition. Rather, we increasingly are called upon to stand up for markets and their inherent strength, which is found in competition.

Nowhere is this drawn into sharper focus than in the international arena, in which jurisdictions without market experience or competition cultures are adopting competition laws. While this is a positive development, we must work to ensure that important competition policy considerations not be subordinated to the desire to take enforcement actions. Enforcers, after all,

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[30]Decision and Order, *In the Matter of San Juan IPA, Inc.*, Docket No. C-4142 (June 30, 2005), *available at* http://www.ftc.gov/os/caselist/0310181/050705do0310181.pdf; Decision and Order, *In the Matter of New Millennium Orthopaedics, LLC*, Docket No. C-4140 (June 13, 2005), *available at* http://www.ftc.gov/os/caselist/0310087/050617do0310087.pdf; Decision and Order, *In the Matter of Preferred Health Services, Inc.*, Docket No. C-4134 (Apr. 13, 2005), *available at* http://www.ftc.gov/os/caselist/0410099/050419do0410099.pdf; Decision and Order, *In the Matter of White Sands Healthcare Systems, L.L.C.*, Docket No. C-4130 (Apr. 13, 2005), *available at* http://www.ftc.gov/os/caselist/0310135/050114do0310135.pdf.

get credit and gain respect for taking actions. Conversely, enforcers rarely get credit for what they do *not* do, for the actions they do not take, for leaving it to the market to sort out – even when that is the right answer. At the fourth annual ICN meeting, held in Bonn in early June, I told my counterparts from 80 jurisdictions that I believe we have a special charter – to stand up for competition and the vitality of markets – which has the greatest chance of benefitting consumers. It was particularly moving to have the opportunity to address a group that included enforcers from such nations as Russia, Latvia, Estonia, Sri Lanka, and Vietnam in the venue that housed the Western German Parliament before reunification and the move back to Berlin. This is an extraordinary time for global competition: 100 competition regimes where fifteen years ago we had twenty, many of them facing the challenges of acceptance within governments and societies not necessarily versed in or open to market principles. But competition enforcement without faith in competition is a house without a foundation – dangerous, indeed.

Even as I advocate for sound policy among my global counterparts, however, my own advocacy beyond our borders lays bare our weaknesses at home. In all corners, we find those who seek protection from the sometimes harsh consequences of the free market. As challenges to private trade restraints have been successful – not to mention, expensive for the losing parties – the attractiveness of seeking public measures that will provide protection increases. Businesses almost always claim to support free markets and reject government interference – that is, until they want protection from government.

Competition enforcers have a responsibility to challenge protectionist measures. In *Kentucky Movers*, the Commission ruled that the Kentucky Households Goods Carriers Association, an organization of moving companies, had engaged in illegal horizontal price-fixing

by participating in the collective setting of the rates that the movers charged to most consumers.[31] The Association claimed that its conduct was shielded from the antitrust laws by the state action doctrine. The primary issue was whether the state agency responsible for supervising the Association's ratemaking had engaged in the "active supervision" that is necessary for the state action doctrine to apply. The Commission found that the state agency's conduct fell far short of what was required to meet the active supervision requirement because the state agency had no formula or methodology for determining whether the movers' rates were reasonable, and the state agency did not even obtain any cost and revenue data that would allow it to make this determination.

In addition to cases, though, our competition advocacy program is active and growing. In 1989, this Section observed in a report on the FTC: "Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's budget."[32] While we do not expend our resources on advocacy at anywhere near that rate, there can be no doubt that encouraging decision-makers to think harder about what they are trying to accomplish and whether it can be done in a way that is less restrictive of competition furthers the public interest.

Our recent competition advocacy filings generally have sought to achieve one of three objectives: (1) facilitating entry, (2) eliminating perverse market incentives, and (3) making it easier for consumers to get useful information. Specifically, in the last year, we have submitted

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[31] *In the Matter of Kentucky Household Goods Carriers Association, supra* note 26.

[32] Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission, in 65 Antitrust Trade Regulation Report S-23 (1989).

advocacy letters directed at legislation that would impose minimum service requirements on real estate brokers, which in our view make it harder for agents to offer consumers a broader scope of options and to compete on price.[33] This work has not made us particularly popular, and, quite frankly, we have not been very successful so far. The real estate lobby apparently is convincing state legislatures and governors that limited-service brokers are simply free riders that should be restrained. Popular or not, we will continue to advocate against measures that protect incumbents from competition while providing few or no offsetting consumer benefits.

The Commission also has commented on proposed regulations of pharmacy benefit managers ("PBMs") in California and North Dakota.[34] These letters pointed out how restrictions on PBMs' ability to offer health plan sponsors low-cost pharmacy networks and how requiring PBMs to disclose financially sensitive information are likely to cause consumers to pay higher prices for health insurance. In both the North Dakota and California matters, the FTC was successful in persuading state decision makers that these bills were likely to harm consumers.

In addition, during the last year, the Commission commented on proposed and existing "sales-below-cost" laws, which prohibit retailers from selling gasoline to consumers below a

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[33]*See* Letter from the FTC and the Department of Justice to Governor Matt Blunt (May 23, 2005), *available at* http://www.ftc.gov/opa/2005/05/mrealestate.htm; Letter from the FTC and the Department of Justice to Alabama Senate (May 12, 2005), *available at* http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf; Letter from the FTC and the Department of Justice to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Commission (Apr. 20, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.

[34]*See* Letter from the FTC Staff to North Dakota State Senator Richard Brown (Mar. 8, 2005), *available at* http://www.ftc.gov/os/2005/03/050311northdakotacomnts.pdf; Letter from the FTC Staff to Repepresentative Greg Aghazarian (Sept. 7, 2004), *available at* http://www.ftc.gov/be/V040027.pdf; Letter from Governor Arnold Schwarzenegger to Members of California State Assembly (Veto of Assembly Bill 1960) (Sept. 29, 2004) *available at* http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

statutorily-prescribed measure of cost.[35] Currently, eleven states have such laws. The Commission argued that such laws are likely to discourage competitive pricing by subjecting price-cutters to liability even when there is no likelihood of harm to competition. As a recent *Wall Street Journal* editorial piece explained in criticizing these laws, "antitrust is not about protecting competitors from more efficient, or more aggressive companies."[36]

Critical to being a champion for competition is understanding the marketplace, as well as educating the public on its workings. Last month, the Commission released a report entitled, *Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition*.[37] It is clear that in a society characterized by mobility and productivity, gasoline is a vital tool in consumers' lives. Moreover, there is perhaps no other product for which consumers witness and feel price changes, as large gasoline price placards stare down at us from seemingly every corner. Understandably, recent price increases and pricing volatility have consumers raising questions about the competitiveness of the retail gasoline market. We recognize that consumers, as well as their elected representatives and other officials, are frustrated by rising gasoline prices.

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[35]Letter from the FTC Staff to Michigan State Representative Gene DeRossett (June 18, 2004), *available at* http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf; Letter from the FTC Staff to Kansas State Senator Les Donovan (Mar. 12, 2004), *available at* http://www.ftc.gov/be/v040009.pdf; Letter from the FTC Staff to Alabama State Representative Demetrius Newton (Jan. 29, 2004), *available at* http://www.ftc.gov/be/v040005.htm. *See also* Letter from the FTC Staff to Wisconsin State Representative Shirley Krug (Oct. 15, 2003), *available at* http://www.ftc.gov/be/v030015.htm; Letter from the FTC Staff to North Carolina State Senator Daniel G. Clodfelter (May 19, 2003), *available at* http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf.

[36]Kimberly A. Strassel, *Another Reason to Love Wal-Mart*, THE WALL STREET JOURNAL, June 29, 2005, at A15.

[37]*Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition* (July 2005), *available at* http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf.

We issued the *Report* because we believe that it is vital to provide the facts about gasoline pricing. We found that gas prices are driven largely by worldwide supply, demand, and competition for crude oil. Some, undoubtedly, will attack the *Report* for not assigning blame or finding anticompetitive behavior. We believe, however, that U.S. consumers deserve to know the real factors that determine the price of gas. Our sincere hope is that the *Report* will inform consumers and contribute to the important national debate about gasoline supply and demand. The issue is too important to allow rhetoric to characterize the debate.

We never know for certain when our research and advocacy efforts will be helpful. In June, the Supreme Court relied extensively on a 2004 FTC report in its decision involving interstate wine sales.[38] In *Granholm v. Heald*, the Court struck down Michigan's and New York's discriminatory restrictions on interstate direct wine shipping.[39] Writing for a 5-4 majority, Justice Kennedy relied on the FTC's report multiple times for information about the characteristics of the wine industry. Justice Kennedy also frequently cited the report to support the Court's finding that neither state's law advanced a legitimate local purpose that could not be addressed by reasonable nondiscriminatory alternatives. Responding to the states' argument that the laws were needed to protect minors, the Court cited the report's finding that the 26 states that currently allowed direct shipments reported no evidence of increased alcohol sales to minors. The Court also relied on the report for its finding that the states' laws were not needed to maintain tax revenue levels, facilitate orderly market conditions, protect public health and safety,

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[38]See FTC, *Possible Anticompetitive Barriers to ECommerce*: Wine (July 2003), *available at* http://www.ftc.gov/os/2003/07/ winereport2.pdf.

[39]*Granholm v. Heald*, __ U.S. __, 125 S. Ct. 1885 (2005).

or ensure regulatory accountability.

In our advocacy work, we also frequently weigh in on proposed federal legislation, and are frequently successful in preventing the passage of legislation that would impede competition or protect market participants from antitrust enforcement. But the fact remains that several exemptions and immunities, which shield market participants from the discipline of antitrust law, remain on the books. While there conceivably may be rare instances when a market is better governed by regulation than by antitrust, there should be a sound, factually-supported reason why regulation and displacement of antitrust are necessary. If there is one thing that we have learned about markets, it is that they are not static. Yet, exemptions that are 50 or closer to 100 years old are still in effect.

It is time to re-examine the premises for the statutory antitrust exemptions enacted many decades ago. For example, "natural monopoly" justifications for exemptions have become increasingly less credible in recent years, given technological changes that enable multiple firms to compete. When another rationale, such as protection of a particular industry, underlies an exemption, we should ask if that rationale is still valid in the current environment, especially in light of the general understanding, now spreading around the globe, that competition enhances consumer welfare.

I am pleased that the Antitrust Modernization Commission has added the statutory exemptions issue to their agenda, and I urge the members to look hard at whether these exemptions are still justified. I urge the Section to play a role in this examination. While I recognize the political sensitivity of the exercise, I do not think that it justifies permitting exemptions to persist if there is no current policy justification for doing so.

Finally, I ask you, the members of the antitrust bar, to increase your efforts to champion competition. When I gave my first speech after becoming a Deputy Assistant Attorney General in the Antitrust Division in 2001, I observed that the antitrust bar is impressive not only because it claims so many talented lawyers but because it claims lawyers who truly care about the integrity of our discipline. I still find that to be both impressive and gratifying. But what I also have come to recognize is that we need members of our bar not just to work with one another to debate and refine the application of antitrust law, but also to act as ambassadors throughout our society and globally for market principles and competition.

Our free market system, with its reliance on competition, requires public support. Our work in the international arena reminds us that we cannot take that support for granted. I once had a Brussels competition lawyer tell me that, listening to me speak, it was clear that I had a "passion for competition." I do, and I know you do, too. But we cannot keep that to ourselves; we need to take it outside of our circle. So, when you are thinking about writing projects, perhaps you could think beyond the usual antitrust and business publications and consider more popular media and op-eds. Perhaps you could focus on analyzing instances in which competition has worked, rather than always on market failures. As you think about work in your community, perhaps you could consider guest teaching at a high school and telling kids about market principles and competition. And when you see competition principles under attack in legislative and other public debates, we can always use your help in educating and standing up for the competition point of view.

Thank you.